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Mailed: May 13, 2003

Paper No. 12

CEW

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re American Marine Holdings, Inc.

Serial No. 75/734,318

Ava K. Doppelt of Allen, Dyer, Doppelt, Milbrath &
Gilchrist for American Marine Holdings, Inc.

Vivian Micznik First, Trademark Examining Attorney, Law
Office 104.

Before Simms, Quinn and Walters, Administrative Trademark
Judges.

Opinion by Walters, Administrative Trademark Judge:

American Marine Holdings, Inc. has filed an
application to register the mark shown below on the
Principal Register for "boats."¹ The application includes

¹ Serial No. 75/734,318, in International Class 12, filed June 22, 1999,
based on use in commerce, alleging first use and use in commerce as of
July 1994.

a statement that the mark "is comprised of the letters 'z' and 'x' in a stylized type."



The Trademark Examining Attorney has issued a final refusal to register under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark ZX, previously registered for "boats and structural parts therefor,"² that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In

considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

We turn, first, to a determination of whether applicant's mark and the registered mark, when viewed in their entirety, are similar in terms of appearance, sound, connotation and commercial impression. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impressions that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

² Registration No. 2,434,631 issued March 13, 2001, to Skeeter Products, Inc., in International Class 12.

The Examining Attorney contends that the marks are identical because the registered mark is in typed form and, thus, encompasses all manners of presentation. Applicant does not dispute that the marks may be similar and focuses its argument on the goods and channels of trade.

We agree with the Examining Attorney to the extent that we find the marks to be substantially similar. Both marks are comprised of the letter "Z" and "X" presented in the same order. The letters in applicant's mark retain their character as "ZX" even with stylized script in which applicant's mark is shown. Further, the registered mark is in typed form and may appear in numerous stylized forms that could be the same as or similar to applicant's stylization. Thus, we conclude that the commercial impressions of the two marks are substantially similar.

Turning to consider the goods involved in this case, the Examining Attorney contends that applicant's identified goods are identical to the "boats" portion of the goods identified in the registration. Applicant contends that its goods are "luxury high performance boats with on-board living quarters, all costing well in excess of \$100,000 [whereas registrant's goods are] much

lower priced outboard motor driven fishing boats" (Applicant's brief p. 4); and that "[a]pplicant's targeted consumers are highly sophisticated purchasers of very expensive, luxury high performance watercraft, designed for salt-water ocean use ... [o]n the other hand, Registrant's consumers seek substantially less costly outboard motor driven fishing boats, which constitute an entirely different class of watercraft that almost invariably lacks on-board living quarters ... [and that] Registrant's fishing boats are most popular among fresh-water, bass fishing enthusiasts." (*id.*)

We note that the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration, rather than what the evidence shows the goods or services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). See also, *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991).

While applicant may be correct that, in fact, the types of boats presently sold by applicant and registrant

may be quite different,³ we are bound to determine the issue of registrability based on the goods identified in the application and cited registration. As such, applicant's identified goods, "boats," are identical to the goods in the cited registration, "boats." This term is broad and encompasses all types of boats that are sold to all boat purchasers through all normal channels of trade for boats of all kinds. For example, "boats" includes every type of boat from large luxury cruisers or sailboats to small, inexpensive boats that may be purchased in a sporting goods store. In other words, boats may be purchased by ordinary purchasers comprising the general public.

It is further likely that registrant's "structural parts [for boats]" are closely related to "boats," but it is unnecessary for us to draw this conclusion.

Therefore, we conclude that in view of the substantial similarity in the commercial impressions of applicant's mark, ZX in stylized form, and registrant's mark, ZX, their contemporaneous use on the identical

³ Although not relevant in this case, we note that there is no evidence in the record regarding the nature of registrant's boats or regarding the types of purchasers and channels of trade of different types of boats.

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goods involved in this case is likely to cause confusion as to the source or sponsorship of such goods.

Decision: The refusal under Section 2(d) of the Act is affirmed.